

Half of the Story An Analysis of Schumer's Speech to the ACS

In his speech Thursday, U.S. Sen. Charles Schumer (D-N.Y.) created a false impression about what actually occurred at Justice Ginsburg's confirmation hearings. In fact, Justice Ginsburg declined to answer Senators' questions **55 times**, on issues including:

- Gender discrimination [165]
- Voting Rights Act and other race discrimination issues [351, 144, 253, 170]
- Gay rights [146, 322]
- Rights of the disabled [146, 359]
- Religion and the separation of church and state [180, 360]
- Restrictions on abortion and taxpayer funding for abortion [150, 243-44, 287]
- Death penalty [265]
- Foreign relations and criminal justice [336]

Even in the issue areas that Sen. Schumer emphasized, such as abortion, Justice Ginsburg answered *only* those questions to which the Senate *already knew the answers*.

Justice Ginsburg was not alone. President Clinton's second Supreme Court appointee, Justice Stephen Breyer, likewise declined to answer Senators' questions **18 times**, on issues including:

- Gender discrimination [178]
- Race discrimination laws [278]
- Abortion [138]
- Death penalty [233, 236]
- Criminal defendants' rights [256]
- Separation of church and state [377-78]
- Government regulations of industry [113-14]

Sen. Schumer omits significant portions of questioning and neglects to include Justice Ginsburg's own explanations of her answers.

I. Justice Ginsburg's Answers

Schumer asserted that Justice Ginsburg provided frank answers on questions relating to a broad range of issues, including free speech and abortion. But Sen. Schumer failed to mention that ***Justice Ginsburg also refused to answer many questions on these same topics and often answered only those questions that the Senate already knew the answers to.***

A complete review of Supreme Court confirmation hearings demonstrates that throughout history, each Justice made an individualized decision over what she or he felt comfortable answering, and the Senate Judiciary Committee respected that decision. For example, Justice Ginsburg declined to answer Senators' questions 55 times. Similarly, Clinton appointee Justice Stephen Breyer declined to answer questions 18 times. The Senate has never forced a Supreme Court nominee to answer a checklist of questions.

II. Free Speech

Sen. Schumer asserted that the Senate gained great insight into Justice Ginsburg's views on free speech and the First Amendment. What did the Senate learn? Justice Ginsburg merely assured the Senate that she would not require the government to run a pro-smoking ad every time it ran an anti-smoking ad. She also said, "I don't think anyone has taken the first amendment or equal protection principle to the length of saying Government must fund equally anything anyone considers art." Ginsburg Hrg. 160.

What did the Senate fail to learn? *Sen. Schumer neglects to mention all of the free speech questions Justice Ginsburg declined to answer:*

- whether the First Amendment permits Congress to regulate hate speech, *Ginsburg Hrg. 357-59*;
- whether she agreed with the Supreme Court's decision upholding a ban on the use of federal funds for abortion counseling under the First Amendment, *Ginsburg Hrg. 287*;
- whether the First Amendment permits Congress to regulate violence on television to the same degree it regulates obscene materials, *Ginsburg Hrg. 350*;
- whether the First Amendment protects speech for entertainment as much as it protects political speech, *Ginsburg Hrg. 315*;
- whether the Supreme Court committed judicial activism in striking down portions the 1971 campaign finance act on First Amendment grounds, *Ginsburg Hrg. 352*;
- whether the First Amendment allows the government to regulate the materials carried by libraries that receive federal funds, *Ginsburg Hrg. 184*.

III. Abortion and Privacy

He noted that Justice Ginsburg discussed abortion and the right to privacy at her hearing. But, he failed to mention that Justice Ginsburg had "spoken about [abortion] as a teacher since the middle seventies" and "written about it in law review articles" at length. *Ginsburg Hrg. 264-65*. Indeed, Justice Ginsburg had advocated a right to abortion that was significantly broader than the right the Supreme Court recognized. Justice Ginsburg had argued that both the Due Process Clause and the Equal Protection Clause both created a right to abortion. *E.g.*, Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 North Carolina Law. Rev. 375, 384-86 (1985). Justice Ginsburg had indicated that the right to abortion belonged to a woman alone, not to a woman consulting with her physician. *Id.* Justice Ginsburg had speculated that if the government helped poor women pay for childbirth expenses, it must also use taxpayer dollars to fund abortions. *Id.* Accordingly, it was not surprising when Justice

Ginsburg stated, for example, that the Equal Protection Clause may create a right to abortion. *Ginsburg Hrg.* 205.

A review of the hearing transcript shows that ***Justice Ginsburg answered only those abortion questions that the Senate already knew the answers to.*** Ginsburg said as much herself. Justice Ginsburg explained that she would answer questions *only* if she had “written . . . an opinion or an article” on it, and then she would only explain what her written words meant: “If I have written something, either in an opinion or an article, and you want to ask me about what I wrote, something you think should be clarified or questioned, then you can confront me with my writing. Yes, I think that is right.” *Ginsburg Hrg.* 319-20. ***When a Senator asked Justice Ginsburg about something about which she had not written, Justice Ginsburg refused to answer.***

For example, Justice Ginsburg repeatedly refused to answer questions on whether she agreed with the Supreme Court’s recent decisions on taxpayer funding for abortion:

Senator HATCH: Irrespective of your views on the policy of abortion funding, do you agree that *Maier* and *Harris*, those two cases, were decided correctly?

Judge GINSBURG: I agree that those cases are the Supreme Court’s precedent. I have no agenda to displace them, and that is about all I can say. I did express my views on the policy at stake, but the people have not elected me to vote on that policy.
Ginsburg Hrg. 268.

Sen. Specter: Do you agree with the Supreme Court’s judgment in *Rust v. Sullivan* that the government may prohibit clinics from using federal funds toward counseling concerning, referrals for, and activities advocating abortion.

Judge GINSBURG: I am uncomfortable about inquires concerning how I would cast my vote in a particular case. I will address and expand to the extent I am able, any vote I have cast...I don’t want to sit here before this committee, however, and write the opinion I would have written in the *Rust v Sullivan* case.
Ginsburg Hrg. 287.

Justice Ginsburg also refused to say whether she would allow even minor abortion regulations to ensure patients had full information: “What regulations will be permitted is certainly a matter likely to be before the Court. . . . It would not be appropriate for me to go beyond the Court’s recent affirmation that abortion is a woman’s right.” *Ginsburg Hrg.* 150, 243-44. And Justice Ginsburg declined to answer whether fathers have any rights to decide the fate of their children in the womb. *Ginsburg Hrg.* 207.

Sen. Schumer also failed to mention the course taken by other Supreme Court nominees, who had not written extensively on abortion at the time they were nominated. For example, Clinton

appointee Justice Breyer refused to answer any questions on whether he agreed with *Roe*:

Senator THURMOND. . . . Do you agree that the first trimester of pregnancy is distinctive and that the State should not be able to prohibit abortion during that period?

. . . .

Judge BREYER. . . . *Roe v. Wade* has been the law of the land for 21 years or more. . . . The questions that you are putting to me are matters of how that basic right applies, where it applies, under what circumstances. And I do not think I should go into those for the reason that those are likely to be the subject of litigation in front of the Court.

Breyer Hrg. 138.

Justice Sandra Day O'Connor did the same:

Senator EAST. [Does the] particular statement by Justice White as a dissenter in *Roe v. Wade* . . . sound to you like a good statement of your judicial philosophy . . .?

. . . .

Judge O'CONNOR. . . . I understand your concern, and I appreciate it; I think it is appropriate. It is just that I feel that is improper for me to endorse or criticize a decision which may well come back before the Court in one form or another and indeed appears to be coming back with some regularity in a variety of contexts. I do not think we have seen the end of that issue or that holding and that is the concern I have about expressing an endorsement or criticism of that holding.

O'Connor Hrg. 107-08.

Justice David Souter followed this course as well, despite the fact that the Senate had relatively little information on him:

Senator BIDEN. Now, let us say that a woman and/or her mate uses such a birth control device and it fails. Does she still have a constitutional right to chose not to become pregnant?

Judge SOUTER. Senator, that is the point at which I will have to exercise the prerogative which you were good to speak of explicitly. I think for me to start answering that question, in effect, is for me to start discussing the concept of *Roe v. Wade*. I would be glad—I do not think I have to do so for you—but I would be glad to explain in some detail my reasons for believing that I cannot do so, but of course, they focus on the fact that ultimately the question which you are posing is a question which is implicated by any possibility of the examination of *Roe v. Wade*. That, as we all know, is not only a possibility, but a likelihood that the Court may be asked to do it.

Souter Hrg. 59.